Filed 7/26/10 In re L.S. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re L.S. et al., Persons Coming Under the Juvenile Court Law.	C062573
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. S.C., Defendant and Appellant.	(Super. Ct. Nos. JD227401, JD227402)
In re L.S. et al., Persons Coming Under the Juvenile Court Law.	C062892
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. S.C. et al., Defendants and Appellants.	(Super. Ct. Nos. JD227401, JD227402)

In these consolidated cases, S.C. (mother) and A.S. (father), parents of infant twins (the minors), appeal from

orders of the juvenile court denying their petitions for modification and terminating parental rights. (Welf. & Inst. Code, §§ 388, 366.26, 395.)[1]

Appellants contend the juvenile court erred in denying their petitions for modification and the Sacramento County Department of Health and Human Services (the Department) failed to comply with the notice requirements of the Indian Child Welfare Act (the ICWA) (25 U.S.C. § 1901 et seq.). Finding merit only in the latter contention, we shall reverse the termination orders and denial of father's petition for modification to permit proper notice to the Indian tribes.

FACTUAL BACKGROUND

The twin minors were detained in April 2008, having been born 10 weeks premature and positive for methamphetamine. Both parents were arrested shortly thereafter on theft-related charges and were in custody during most of the dependency proceedings. The parents did not visit the minors prior to being arrested and were not permitted visitation while in custody.

Mother claimed Cherokee heritage. The Department sent notice to the Cherokee tribes, however, the notice contained information on only the minors and the parents, although the

[1] Undesignated statutory references are to the Welfare and Institutions Code.

Department knew the name of the maternal grandmother, through whom Indian heritage was claimed.

In July 2008, the court denied services to mother due to her past serious substance abuse problems and failure to rehabilitate but granted services to father, because he was a presumed father. Father served time in local custody and was advised to participate in services at his facility. By his release in January 2009, he had completed parenting, life skills and job readiness classes as well as some vocational training. After his release from custody, father began twice-weekly supervised visits with the minors. The social worker referred him to therapy, drug testing, and 12-step meetings. He said he did not have a drug problem and saw no reason to do substance abuse treatment. In February 2009, father had two positive drug tests for methamphetamine and a presumptive positive drug test in March. At first, he denied drug use but later requested a substance abuse assessment.

Because the time limit on services had passed, the Department recommended termination of services at the six-month review hearing. At the hearing in March 2009, the court followed the Department's recommendation, terminated services, and set a section 366.26 hearing.

At the end of June 2009, mother filed a petition for modification seeking an order for reunification services. Mother alleged circumstances had changed because she had been released from custody. Further, she alleged she had

participated in some parenting classes while in prison, was released to a substance abuse treatment program, and was now enrolled in an outpatient program. She also alleged the proposed change was in the minors' best interests "because it allows the children to be with their natural mother, who has worked diligently to turn her life around and is now able to provide a safe and loving home" for them. Several letters were attached to the petition. The first was a letter from El Dorado House stating mother entered the program May 5, 2009, and was paroled from it on June 15, 2009. While in the program, mother worked on substance abuse issues and engaged in counseling and drug tested monthly with negative results. A second letter stated mother was currently living in a sober living residence and complying with the rules. A third letter stated mother was currently involved in an outpatient program which she was due to complete in September 2009.

The court denied the petition without a hearing because the proposed change did not promote the best interests of the minors, noting that the minors were removed nine days after birth and had no relationship with mother. The court also stated that the caregivers were committed to adoption of the minors.

In July 2009, father filed a petition for modification. He sought placement of the minors and maintenance services. He alleged circumstances had changed because after his release from custody he completed the service plan on his own, including

substance abuse treatment, counseling, and continued attendance at 12-step meetings. The court set a hearing on the petition.

The assessment for the section 366.26 hearing stated father had no contact with the minors until March 2009 at which time he began regular supervised visitation. Mother first visited the minors in May 2009 and had monthly visits thereafter following her release from state prison. At the most recent visit, the parents came together and interacted appropriately with the minors. The minors had been in their current placement for 14 months. Both were receiving services from Alta California Regional Center for delays associated with their premature birth. The current caregivers were interested in adoption. The minors were likely to be adopted despite their mild delays and they had a minimal relationship with appellants.

At the combined hearing on the petition for modification and selection of a permanent plan, father presented evidence of his progress in services following the review hearing. His substance abuse counselor and his 12-step sponsor testified about his commitment to continuing sobriety and progress in treatment. The visit supervisor described father's positive interactions with the minors and the lack of problems during visits. The visit supervisor also testified that the foster parents were the minors' parental figures and that, when the foster mother was present, the minors did not interact with father. The paternal grandmother testified she had seen changes in father since he committed to sobriety. Father testified he

had continued services on his own and that counseling helped him recognize he was in denial about his substance abuse problem.

The court commended father for his efforts and his progress and found there had been a change in circumstances although it was apparent father had more work to do. However, the question of best interests of the minors remained. The court observed that the minors were removed shortly after birth, had been with the foster parents nearly all their lives, and had a right to permanence. The court recognized the difficulties of engaging in services while incarcerated but also noted that father had been in denial for most of the reunification period and only recently took full advantage of the services available to him. The court concluded that it was not in the minors' best interests to extend services and denied the petition for modification.

The court adopted the recommended findings and orders, terminated parental rights, and selected adoption as the permanent plan.

DISCUSSION

I

Both father and mother contend the juvenile court erred with respect to their petitions for modification.

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new

evidence or a showing of changed circumstances.[2] "The parent requesting the change of order has the burden of establishing that the change is justified. [Citation.] The standard of proof is a preponderance of the evidence." (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) The best interests of the child are of paramount consideration when the petition is brought after termination of reunification services. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In assessing the best interests of the child, the juvenile court looks not to the parent's interests in reunification but to the needs of the child for permanence and stability. (*Ibid.*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

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[2] Section 388 provides, in part: "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶] . . . If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, termination of jurisdiction, or clear and convincing evidence supports revocation or termination of court-ordered reunification services, the court shall order that a hearing be held . . . ." (§ 388, subds. (a), (d).)

A. Mother's Petition

Mother argues the court erred in denying her petition without a hearing. We disagree.

To establish the right to an evidentiary hearing, the petition must include facts which make a prima facie showing that there is a change in circumstance and "the best interests of the child may be promoted by the proposed change of order." (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672-673; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414; Cal. Rules of Court, rule 5.570(d).) More than general conclusory allegations are required to make this showing even when the petition is liberally construed. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence . . . would sustain a favorable decision on the petition." (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.)

Mother's allegation about the minors' best interests was very general and conclusory, focusing primarily on changes mother had made and including only a general statement that children's interests are best served by being with a biological parent. Mother did not suggest why or how that general statement applied in this case, where she had no contact with the minors after their birth, with the exception of a few monthly visits after her release from prison, and had absolutely no relationship with them. Mother was a stranger to the minors who did not offer them permanency. Because mother did not plead

facts showing the proposed change was in the minors' best interests, the court properly denied the petition for modification on that ground without holding a hearing. (*In re Daijah T.*, *supra*, 83 Cal.App.4th at pp. 672-673; *In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.)

B. Father's Petition

Father argues it was an abuse of discretion to deny his petition for modification because he did the required services, participating even after termination of services at the six-month review hearing, and had showed he could provide for the minors.

The court found father's petition facially adequate and granted a hearing. The evidence attached to the petition and the supporting testimony at the hearing established changed circumstances. Nonetheless, father's sponsor made it clear there was more work to be done to understand and hone the tools father needed to maintain sobriety. Moreover, the evidence did not show the proposed order was in the minors' best interests. As we have stated, the interest of a minor after termination of services is in permanence and stability. The minors here were in a stable placement, which offered permanence. Father had no contact with the minors during the first eight months of their lives. He did begin visiting as soon as he was released from custody but the minors' primary bond was with the foster parents. While they enjoyed their visits, the visit supervisor made it clear that if the foster parents were in the room, the

minors would not interact with father at all. The court was required to weigh the benefits to the minors of permanence and stability in a secure placement against the ongoing uncertainty that would result from either placement with, or renewed services for, father. The juvenile court did not abuse its discretion in determining that the minors' interests in permanence outweighed the possibility of forming and maintaining a relationship with a father they barely knew.

II

Appellants contend, and respondent concedes, the notice of the proceedings sent to the Cherokee tribes was defective in that it did not contain all ancestor information known to the Department and there was no inquiry made of the maternal grandmother about the family's Indian ancestry even when the social worker was in contact with her to inquire about placement of the minors.

If known, the agency should provide the name and date of birth of the child; the tribe in which membership is claimed; the names, birth dates, and places of birth and death, current addresses and tribal enrollment numbers of the parents, grandparents and great-grandparents as this information will assist the tribe in making its determination of whether the child is eligible for membership and whether to intervene. (§ 224.2; 25 C.F.R. § 23.11(a), (d), (e); 44 Fed.Reg. 67588 (Nov. 26, 1979); *In re D. T.* (2003) 113 Cal.App.4th 1449, 1454-1455.)

Here, the Department was aware of the maternal grandmother's name and was in contact with her. At the very least, information about her should have been included and minimal inquiry made about any other ancestors whose information could support the claim of Indian ancestry. The record supports the contention and we shall accept the concession.[3] Reversal of the orders terminating parental rights and denying father's petition for modification is required.

DISPOSITION

The orders terminating parental rights and denying father's petition for modification are reversed and the matter is remanded for the limited purpose of compliance with the ICWA. The juvenile court shall order the Department to comply with the notice and inquiry provisions of the ICWA. Thereafter, if there is no response or if the Cherokee tribes determine the minors are not Indian children, the orders shall be reinstated. However, if a Cherokee tribe determines the minors are Indian children and the court determines the ICWA applies to this case,

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[3] The Department contends, pursuant to *In re Holly B.* (2009) 172 Cal.App.4th 1261, 1266, that even if the selection and implementation orders must be reversed and the case remanded for proper ICWA notice, the orders denying the petitions for modification need not be. In *Holly B.*, an appeal was taken from a ruling on a petition for modification, which did not affect the interests protected by the ICWA, specifically, information to assist the Department in making decisions about the minor. Mother's petition is within the orders described by *Holly B.* because she only sought an order for services. However, father's petition requested services and placement, which would implicate tribal interests.

the juvenile court is ordered to conduct a new combined hearing to determine father's petition for modification and to select a permanent plan for the minors in conformance with all provisions of the ICWA.

BUTZ, J.

We concur:

HULL, Acting P. J.

ROBIE, J.